

**BEFORE THE THREE MEMBER DUE PROCESS HEARING PANEL
EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION
PURSUANT TO SECTION 162.961, RSMo.**

, by and through his parents,) Petitioners) vs.) Oak Grove R-VI School District) Respondent)))))))	
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COVER SHEET

PETITIONER

Student's Name:
DOB:
Grade Level: 3d

Parents' Names:
Address:

Representative: Address:	Duke MacDonald Missouri Protection & Advocacy Services 3100 Main Street, Suite 305 Kansas City, Missouri 64111
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RESPONDENT

Local Education Agency: Address:	Oak Grove R-VI School District 615 South East 12th Street Oak Grove, Missouri 64075
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Representative: Address:	Ms. Shellie Guin Doster Mickes James & Ullom LLC 4600 Madison, Suite 711 Kansas City, Missouri 64112
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Hearing Dates:	December 29, 2003 and March 15, 2004
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Date for Mailing of Decision: April 19, 2004

Date of Decision: April 19, 2004

Date Decision Mailed: April 19, 2004

Panel Members: Dr. Terry Allee
Mr. Rand Hodgson
Ms. Margaret M. Mooney, Chairperson

ISSUES AND PURPOSE OF HEARING

This Hearing which involved a Request for Due Process filed by Parents and a Request for Due Process filed by School District, the issues were

1. Can Student benefit from education provided by District? and
2. Can District provide a program suitable for student?
3. Was an IEE requested by the parents necessary?

TIME LINE INFORMATION

Petitioners' request for due process was sent to the Department of Elementary and Secondary Education on September 29, 2003, a Decision initially was due by November 13, 2003. On October 10, 2003, the Hearing Chair issued an Order setting this matter for Hearing on November 10 and 11, 2003. On October 23, 2003, Counsel for Parents requested a continuance of the Hearing. The Hearing was rescheduled to December 15-17, 2003. On December 4, 2003 Counsel for Parents' again requested an extension of time, which was opposed by the School District. After a telephone conference with counsel, by agreement of the parties the Hearing was rescheduled for December 29, 2003 in Oak Grove, Missouri, with the Decision to be rendered and mailed by January 9, 2004.

On October 3, 2003, Oak Grove School District wrote to DESE requesting Due Process on the issue of the Independent Education Evaluation sought by parents. The School District Due Process request was assigned to Janet Davis Baker as Chair of the Due Process Hearing Panel. On October 30, 2003, Counsel for the School District moved to consolidate the two Due Process Hearings. Counsel for both parties agreed to consolidation during a telephone conference with Chairperson Mooney. On October 30, 2003 an Order was entered consolidating the two due process requests. On November 3, 2003 Ms. Janet Davis Baker closed and forwarded her file to Ms. Mooney.

At the Hearing on December 29, 2003 Hearing Panel Exhibits 1-20 were marked and received into evidence. Parents stipulated that Student was severely handicapped pursuant to Missouri statute and that an Independent Educational Evaluation (“IEE”) is not likely to reveal any information that would determine that he is not severely handicapped under Missouri law. (December 29, 2003 Transcript, p. 6). The date for mailing a decision was extended to February 18, 2004.

On December 29, 2003, School District filed a Motion to Dismiss based on the District Court decision in Springfield R XII School District v. Missouri Department of Elementary and Secondary Education, Case No. 01-3311-CV-W-SOW (W.D. Mo. 2002). Counsel for Parents filed two memoranda in Opposition to the School District Motion to Dismiss. On February 13, 2004 the Hearing was rescheduled for March 15, 2004 with the Decision to be mailed by March 31, 2004.

On March 1, 2004 the United States Circuit Court for the Eighth Circuit issued its decision in Springfield R-XII School District vs. Missouri Department of Elementary and Secondary Education, No. 02-3765, WL 36901, 8th Cir. 2004, affirming in part the decision of the United States District Court for the Western District of Missouri.

On March 12, 2004 School District attempted to serve a renewed Motion to Dismiss on the Hearing Panel and Counsel for Petitioners. Complete copies were not received until the morning of the Hearing, March 15, 2004. The Hearing Panel discussed the School District’s renewed Motion to Dismiss with the parties and agreed that Parents would be given an opportunity to respond to the Motion to Dismiss after the taking of testimony.

The Hearing reconvened in the Oak Grove R-VI School District High School at 9:00 a.m. on March 15, 2004. At the Hearing (a) Parents were represented by counsel; (b) Parents elected to open the Hearing to the public; (c) Student was not present; (d) Parties agreed not to exclude witnesses from the Hearing prior to testifying; and (e) the Hearing Panel marked and received into evidence Hearing Panel Exhibit 21 which had extended the dates for Hearing and mailing the Decision.

Parents presented an opening statement and the testimony of four witnesses: Father, Mother, Vicki Bird, Director of Special Services for School District and Crystal Atkinson, Student’s Special Education teacher. Parents had Merv Blunt, a representative of Missouri State Schools for Severely Handicapped available to testify, however the Hearing Panel decided that it was not necessary to hear testimony from Mr. Blunt and prohibited Parents from introducing his testimony because it was not relevant to the issues to be decided. School District presented an opening statement and cross examined all of the witnesses.

All of the Joint Exhibits 1 to 123 (as supplemented) marked by the parties were received into evidence. At the conclusion of the testimony on March 15, 2004, it was agreed by the parties that the date for mailing the Decision would be extended to April 19, 2004.

The Hearing Panel unanimously decided:

1. Student is a severely handicapped child and, as such, his placement is with DESE.
2. Oak Grove does not operate an approved program of special instruction for severely handicapped children.
3. Oak Grove does not operate a program of special instruction for severely handicapped children sufficient to enable such a child to achieve the best possible adjustment in society under the limitations of his handicap.
4. Oak Grove is unable to provide a program of special instruction for this severely handicapped child, which would provide FAPE.
5. Student is unable to benefit from or meaningfully participate in a program for handicapped children at Oak Grove.
6. A public separate day facility is an appropriate placement for Student.
7. Student has been accepted by DESE as a severely disabled child and qualified him for the severe disability fund, thus by statute Oak Grove not longer must fulfill any responsibility to Student and DESE is responsible for his education and must hold an IEP meeting within the next 30 days.
8. Parents' request for due process is dismissed.
9. School District's request for due process is dismissed

The Decision was mailed to both parties by certified mail on April 19, 2004

Margaret M. Mooney, Panel Chair

BEFORE THE THREE MEMBER HEARING PANEL
CONVENED PURSUANT TO RSMO §162.961

, by and through his parents,)	
,)	
Petitioners.)	
)	
v.)	
)	
Oak Grove R-VI School District,)	
)	
Respondent.)	

DECISION AND ORDER

This Due Process Hearing convened on December 29, 2003 and March 15, 2004 in a meeting room of the Oak Grove School District. Present at both sessions were Panel Members Margaret M. Mooney, Terry Allee and Rand Hodgson, Parents (“Parents”) with Duke McDonald, counsel for Parents and Vicki Bird, School District representative with Shellie Guin, counsel for the Oak Grove R-VI School District (“Oak Grove” or “School District”)

Procedural Background/Timeline

Petitioners’ request for due process was sent to the Department of Elementary and Secondary Education (“DESE”) on September 29, 2003, a Decision was initially due by November 13, 2003. On October 10, 2003, the Hearing Chair issued an Order setting this matter for Hearing on November 10 and 11, 2003. On October 23, 2003, Counsel for Parents requested a continuance of the Hearing. The Hearing was rescheduled to December 15-17, 2003. On December 4, 2003 Counsel for Parents’ again requested an extension of time, which was opposed by the School District. After a telephone conference with counsel, by agreement of the

parties the Hearing was rescheduled for December 29, 2003 in Oak Grove, Missouri, with the Decision to be rendered and mailed by January 9, 2004.

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The Hearing was convened on December 29, 2003. Parents and School District were represented by Counsel. Hearing Panel Exhibits 1-20 were marked and received into evidence. Parents stipulated that Student was severely handicapped pursuant to Missouri statute and that an Independent Educational Evaluation (“IEE”) is not likely to reveal any information that would determine that he is not severely handicapped under Missouri law. (December 29, 2003 Transcript, p. 6). The date for mailing a decision was extended to February 18, 2004.

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The issues for Hearing were:

1. Can Student benefit from education provided by District? and
2. Can District provide a program suitable for student?

These were determined by the Hearing Panel after the December 29, 2003 Hearing to be the only issues triable by a Due Process Hearing Panel appointed pursuant to R.S. Mo. §162.961 and under the IDEA 20 U.S.C. §§1412 et seq.

All of the Joint Exhibits 1 to 123 (as supplemented) marked by the parties were received into evidence. At the conclusion of the testimony on March 15, 2004, it was agreed by the parties that post- hearing briefs would be filed by March 31, 2004 and that the date for mailing the Decision would be extended to April 19, 2004.

Findings of Fact

1. Student is a severely handicapped child, who qualifies for special education under the categorical disabilities of autism and mental retardation. Transcript 12-29-03, p. 6; Ex. 86. Student's DOB is April 19, 1995. Transcript 3-15-04 ("Tr.") 58:10-14. He lives with both parents in Oak Grove, Missouri. Tr. 38:5-8. Student currently functions at about a three-year-old level. Tr. 200:23 – 201:9. In addition to school, Student attends a special education Sunday School class in Oak Grove with five or six other students. Tr. 110:15-111:7. Student's parents take him to restaurants, grocery stores and malls in the community. Tr. 48:22 – 49:3, 75:12-18.

2. Vicki Bird is the Director of Special Services for Oak Grove. She has held this position for six years. She has a bachelor's degree in elementary education and special education kindergarten through 12, specifically mental retardation, a master's degree in learning disabilities, certifications in emotionally disturbed and behavior disordered, a degree in

secondary school administration and she is certified in special education administration. Ms. Bird taught for three years at the State School for the Severely Handicapped in Higginsville, MO. She taught the MR classroom at Lafayette County High School for one year and she has been at Oak Grove since 1979. She has attended autism training with Project ACCESS out of SMSU, she is currently the president of LASE (Local Administrators of Special Education) and was recently appointed to the Missouri CASE (Council of Administrators in Special Education) board. Tr. 182:25 –184:25, 131:21-23. Ms. Bird has known Student since he was 3 years old. Tr. 194:1-2.

3. Crystal Atkinson is Student's special education teacher for 2003-2004 at Maple Elementary. Ms. Atkinson has a bachelor's degree in special education with certifications in learning disabilities, emotional disturbance and educable mentally handicapped. She is working on her master's degree in administration. Tr. 259:9 – 260:5. She has taught for seven years. Tr. 353:16-18.

4. Student's parents prefer that he attend school in Oak Grove because they live in Oak Grove, the neighborhood kids know him through school and there is a sense of community. Parents want Student to become as independent as possible. Tr. 50:15 – 51:1; Tr. 56:5-9.

5. Student is nonverbal. He communicates with others using picture icons and an augmentative communication device. Student presently is unable to communicate with a range of caregivers, and he rarely initiates communication at school Tr. 61:14-17, 70:4–9, 286:25–289:2, 144:8–17, 145:17–22. Testimony about Student's attention span varied, his Mother reported one to two minutes for unfamiliar tasks and three to five minutes for familiar tasks. Tr. 74:21 – 75:11. Vicki Bird, special education administrator for the district reported that in the

school setting Student can focus for 5-7 minutes on unfamiliar tasks and for 15 minutes on familiar tasks. Tr. 156:1-17.

6. Student holds a spoon with a functional grasp, but does not consistently use a spoon on his own. Tr. 162:14-20. Student is unable to perform functional life skills, such as cooking, doing laundry, making a bed, dusting, operating a microwave oven, or setting the table. Tr. 49:25 – 50:14, 76:7 – 77:3. Student is ambulatory, but he refuses to move from one location to another at school and often must be carried to another room. Tr. 326:14-24.

7. Student bangs his head when he is frustrated and hits himself on the back for stimulation. Student engages in inappropriate behaviors, such as hitting, pinching, and pulling hair as a result of frustration or when presented with work that he does not want to do. Tr. 46:17 – 48:2, 51:25 – 52:7, 72:1-17, 167:4 – 169:9. He has exhibited such behaviors for a number of years. Tr. 108:13–16.

8. In 1998 Student transitioned from the Rainbow Center, an out-of-district private facility, to the Oak Grove early childhood special education program. Ex. 3. In February 2000, Student's IEP team discussed and considered placement alternatives for Student. Parents toured and looked into placement options outside the School District. Ex. 23. Tr. 84:22- 85:10. The IEP team discussed whether Oak Grove would be the best educational setting for Student in the future. The IEP team determined that Student would try Oak Grove Primary School. Tr. 199:16-19, 86:15-18.

9. In 2000, Student transitioned from School District's early childhood special education services to school age services at Oak Grove Primary School (kindergarten through second grade). On September 25, 2000, Student's educational diagnosis changed from early

childhood special education to autism; his placement changed to a full-day self-contained classroom at Oak Grove Primary School. Ex. 29.

10. Student's December 9, 2000 Diagnostic Summary placed his cognitive ability in the 14-17 month range. Ex. 39. Student's adaptive behavior skills composite score is 40, which placed him in the low range with an age equivalent of one year, four months. Student requires assistance with all daily living needs. Student's receptive language skills are at the 15 to 17 month level, his expressive language skills range from 19 to 22 months, and his academic skills are scattered from zero to three years. He is unable to socialize with peers. Exs. 83 and 90.

11. Oak Grove has utilized a variety of outside resources to provide programming for Student, including training, consultations, interventions and contracted services. Despite all efforts, in 2003-2004 School District has been unable to provide a program of special instruction appropriate for Student. Tr. 200:23 - 202:25, 230:11 – 231:20.

12. Oak Grove sent one special education teacher to Project ACCESS training to become an in-district autism consultant (IDAC) to assist with Student's programming. Tr. 225:2-25, 169:22-23. Student's primary level case manager and 1st, 2nd and 3rd grade teachers all completed Project ACCESS training in autism. Tr. 226:9-18.

13. Every fall a large IEP meeting was held for Student to enable school personnel and his in-home providers to ensure consistency in providing services, e.g. using the same words, phrases and pictures with Student. Tr. 230:16-22, Exs. 50 and 58.

14. In November 2000, Project ACCESS evaluated the School District's program for Student. Project ACCESS noted that Student was not independent in any skills and there was a lack of programmatic focus by the School District., such that it did not appear that the School

District had programming in place to increase his independence. Student's sensory needs were not being addressed as needed, but only as scheduled. Student did not have direct social instruction or interaction with his peers. Tr. 226:19-25; Exs. 31 and 32.

15. In December 2000, the School District contracted with Dr. Rita Williams to conduct a comprehensive evaluation of Student. At this time, Student's parents reported the following behaviors: Student does not imitate other children at play, has not developed any friendships, hurts self by banging head, is very destructive (toys and household items are soon broken), cannot point to more than five named objects, uses 0-5 spontaneous words per day to communicate wants and needs, severe temper tantrums and/or frequent minor tantrums, hurts others by throwing objects, frequently unaware of surroundings, and may be oblivious to dangerous situations. Exs. 37 and 39.

16. In December 2002, Oak Grove contracted with Dr. Edna Smith, an autism expert in the Kansas City area, to conduct a half-day autism in-service for the staff working with Student. Dr. Smith spent the other half of the day observing Student and providing suggestions to the School District about creating a more structured program for Student. Tr. 229:5-230:9, Exs. 59 and 60.

17. During the February 14, 2003 IEP meeting, when Student was in second grade at the primary school, Parents expressed concern that Student was stagnating in all areas, including academics to the IEP team. Parents met with the Superintendent to express their concerns. Tr. 88:7 - 93:6; Tr. 122:3-20, Exs. 65 and 66.

18. In 2003 IEP team members were concerned about the lack of programming capabilities at Maple Elementary for Student and considered other placement options. The IEP

team began discussing and considering other placement options for Student for his transition from the primary to the elementary level. Parents again toured and looked into other programs outside the School District. At a May 9, 2003 IEP meeting, the IEP team discussed Student's need for a change of placement for the 2003-2004 school year at length. Ex. 68. Tr. 93:7-95:5.

19. In May 2003, The Capper Foundation conducted an augmentative communication evaluation of Student. The evaluation notes Student is nonverbal. During the evaluation, Student did not initiate any interactions except taking his caregiver's hand to try to obtain an object or activity. Tr. 145:2-6, Ex. 72.

20. On May 28, 2003, Mother gave written consent for the School District to conduct an evaluation for Student. When she gave consent, Mother agreed with the areas to be assessed. Mother did not request a functional behavioral assessment as part of Student's evaluation. Parents did not raise an issue of the need for a functional behavioral assessment in the context of Student's 2003 evaluation. Ex. 73 Tr. 105:12-21.

21. On June 30, 2003, School District submitted a Justification for Separate School Placement to DESE along with Student's IEP and evaluation report. Tr. 234:11-236:2; Exs. 90 and 100.

22. On July 30, 2003, DESE notified the School District that Student is eligible for services provided by the state board of education. Ex. 91, p. 418.

23. The August 2003 IEP team individually discussed and agreed on the reasons for rejection of less restrictive placement options. Parents were accompanied by several advocates and two attorneys at this meeting. At the August 20, 2003 IEP meeting, the IEP team changed Student's placement to public separate day facility. Tr. 218:6 – 219:14; Tr. 95:20 – 96:19,

235:1-3, Exs. 97 and 121.

23. The School District provided a Notice of Action to Parents on August 22, 2003. Ex. 99. On August 25, 2003, Oak Grove notified DESE that it is unable to provide a program of specialized instruction for severely handicapped children, specifically Student. Oak Grove's referral of Student to DESE certified that District cannot adequately provide an education for Student. The School District specifically certified to DESE that the placement alternatives associated with the local school district responsibility for educational programming were considered by the IEP team and rejected. Tr. 235:1 – 236:2; 256:12- 257:16, Ex. 100.

24. In August 2003, Student began attending Maple Elementary School. Ex. 86. There are approximately 1998 students in School District. Maple Elementary has approximately 450 students in three grades. Because the building was designed in the era of open classes, the classrooms at Maple Elementary are relatively small and are separated by curtained walls. Tr. 184:4–186:25. Parents sought due process in September 2003. Student remained at Maple Elementary under stay-put.

25. Student has medical issues that require him to wear a diaper. He needs a private area at school to change his diaper and clean him. The registered nurse for Maple Elementary divides her time with two other buildings. The nurse's office is a small open area with two cots and a private bathroom, but no private changing area or showering/washing facilities. When Student is taken to the nurse's office for diaper changing other children in the nurse's office (who may be sick), must be moved. A screen is placed between the cots for privacy. If Student has an accident requiring considerable cleaning, he must go home due to lack of facilities at the school. Tr. 192:11– 195:23.

26. Maple Elementary has one speech therapist, who splits her time with the middle school. Speech is the only therapy with designated space in Maple Elementary. Tr. 186:21 – 187:4. Maple Elementary does not have any space that can serve as a functional living area. Maple Elementary does not have a sensory room or any space that provides readily available sensory activities or for light sensory activities, tactile sensory activities, or any other sensory activities. Tr. 189: 4-24.

28. Sensory activities are an important part of Student's educational program. He needs sensory integration every 10-15 minutes throughout his school day. Tr. 115:23 – 116:15. Student requires vestibular stimulation to calm him. Tr. 48:3–9, 76:11–13, 154:3–10. He needs sensory areas and activities available to him, an occupational therapist and physical therapist available to him throughout his day in addition to the scheduled direct services in his IEP to assist in meeting Student's sensory and vestibular needs. Tr. 194:22 – 195:4. Student requires a one-on-one paraprofessional throughout his day. Tr. 54:4-9.

29. Student needs physical movement in P.E., not a structured P.E. class. Tr. 197:19-21. Student needs a large classroom with space to accommodate the number of items he needs to have readily available to him. Student needs a physical setting with space for physical activity and for a swing to be set up and available. Oak Grove does not have the equipment needed to provide physical education for Student. Tr. 195:5 - 197:19-21.

30. Student loves music. At the primary level, Student enjoyed the movement and music class. Student needs the opportunity to practice rhythm, bang a drum or practice marching in music class. At the third grade level, Student attend music class where the other students sit down, open books or a music folder and sing. While other students engage in P.E. activities such

as dodge ball, Student runs his hands along the wall feeling the texture of the brick. Tr. 197:5 – 198:4. Student eats lunch in his classroom rather than in the lunchroom because he is unable to tolerate the number of students and the noise. Tr. 206:4-11. At recess, Student walks along the brick wall with his paraprofessional feeling the texture of the bricks, he does not interact with his non-disabled peers. Tr. 208:5-11.

31. Student needs an environment in which he can learn to be as independent as possible. He needs a functional curriculum in a therapy-intensive setting as close to a realistic setting as possible, with sensory activities and therapists readily available. Student is more likely to generalize a skill when he learns it in as realistic a setting as possible. Tr. 203:11 – 204:8; 205:13 – 206:3. Student needs an environment designed for a functional program that focuses on self-help skills, life skills, community-based instruction, that has an apartment, that has a consumer science curriculum with cooking and meal planning, and a simulated sheltered workshop. Tr. 254:17 – 255:10, 326:5-9.

32. Student does not have academic goals; his current goals are primarily therapy goals and he needs therapy-based programming. Student has one functional goal. Tr. 224:10 – 225:1; 254:13-16.

33. Oak Grove has tried a variety of interventions, strategies and supports for Student's behaviors; none have been successful. Tr. 233:14 – 234:10, 304:8-13. Oak Grove used outside resources, including behavior therapists from the Sherwood Center to observe Student's education, to provide suggestions about behavior, to develop a sensory diet and behavior plans for Student. Tr. 227:1 – 228:24; Exs. 46 and 49.

34. Student is in a class in which all of the other students work on academics. He

needs a smaller class in a self-contained setting with a functional skills focus. Tr. 195:12-15. There is a classroom paraprofessional, not assigned to Student, who works with the other students. Tr. 113:15-25; Tr. 191:10-13. Student is likely to benefit from being around students at a similar level of functioning. Tr. 195:21-23.

35. Student has his own education program that is completely different from all other students because he does not benefit from either a regular or modified 3rd grade curriculum. Tr. 56:1-4, 101:9-14, 101:5-8. Student is unlikely ever to access the general curriculum of a public school or to benefit from any type of academic-based curriculum. Tr. 253:2-10, 205: 1-5. For example, Student will never be able to identify letters of the alphabet, attach sound symbol relationships or do basic math calculations. Tr. 253:11-17.

36. Student's teacher, Crystal Atkinson, has exhausted her resources and expertise in addressing his behaviors and refusal to work within her program at Oak Grove. Tr. 334:17-335:20, 338:18 – 339:1. School District can serve a student who functions at a 3-year-old level in the primary grade level, but it has become more difficult as the child moves to the elementary level because of the increasing gap in developmental levels. Tr. 206:12 – 207:6.

37. Student's IEP shows 150 regular education minutes per week at Oak Grove, including music, P.E., lunch and recess. Tr. 64:20-23. Because of his behaviors he usually eats lunch in his classroom with his paraprofessional. Tr. 206:4-11. Student attends 3rd grade music, but he does not participate because the others take tests and practice singing for school programs. He typically returns to his classroom early because he gets frustrated and exhibits inappropriate behaviors. Tr. 319:10-24. Student does not participate in group activities during P.E.; he usually plays with colored flags, plays in the grass or walks along the brick wall feeling the texture. Tr.

320:3-11.Oak Grove tried to integrate Student into the lunchroom, but he is unable to handle the environment. Tr. 320:17 – 321:9.

38. Student has a visual schedule. Tr. 140:16-18, 260:19-21. Most visual schedules cover an entire day or a longer period of time; but Student is only able to have three to four icons on his visual schedule at a time. Tr. 261:1-12. Student uses his augmentative communication device with hand-over-hand assistance. Tr. 148:6-12.

39. Student receives physical therapy services in the hallway due to lack of space. Tr. 187:12-22. Maple Elementary has no physical therapy equipment set up in the building. Tr. 188:20-22. Oak Grove contracts for physical therapy services which are offered out of the primary school building. The physical therapist (or assistant) comes to Maple Elementary to provide Student with direct services and is not available to him throughout the rest of the day. Tr. 192:4-10.

40. Student must go to another building to work on some of his PT goals due to lack of equipment or facilities at Maple Elementary. Tr. 233:6-13. Student receives occupational therapy in his classroom where other students are receiving educational services. Tr. 187:23 – 188:3. Oak Grove contracts for occupational therapy services, which means that an occupational therapist comes to Maple Elementary specifically to provide Student's direct service minutes and is not in the building or available to Student throughout the rest of the day or on days when he does not receive direct services. Tr. 191:22 – 192:3.

41. The sensory activities available for Student are only those that the occupational therapist brings to Student's classroom, which limits the size and number of OT activities available to Student. Tr. 189:24 – 190:5. His sensory diet has been scaled down, accordingly.

Tr. 242:23 – 243:2. Oak Grove uses a portable swing with Student for vestibular stimulation. Two people are needed to set up the swing and get Student situated in it, which disrupts other students in his class. The swing blocks the door, which is violates fire code. Tr. 154:14 – 155:3. When Student swings in the doorway, he likes to hear the swing bump against the door frame. The more noise he makes, the more he likes it. The noise makes instruction for the other students difficult. Tr. 272:18 – 273:2.

42. Student likes rolling on a barrel as a sensory activity. This is difficult to provide because it require two adults to implement and disrupts instruction for the other students his class. Tr. 273:3-14, 275:7-13. Student likes jumping on a trampoline as a sensory activity. This activity is disruptive to his class because desks are moved to be out of the way. Other students watch Student, losing focus on their academic tasks, and his teacher is pulled away from her instruction. Tr. 277:14 - 278:4.

43. Student enjoys community-based instruction, such as matching items with an icon at the grocery store. Oak Grove has been able to engage in such community-based instruction with Student on average less than once a month. Tr. 279:1-20. Student needs more community integration opportunities than Oak Grove is able to give him. Tr. 318:11-13. Student repeatedly chooses the “van” icon to communicate to his teacher that he wants to leave the school. Tr. 311:25 – 312:12.

44. Student is disruptive to the other students in his class. Tr. 79:1-9, 315:22 – 316:24. He is not able to sit next to other students because he pinches or hits them. Tr. 136:23-25. Attempts have been made to include Student in group activities, but he is isolated to a degree in order to keep the other students in the class safe. Tr. 137:1-3. Student’s behaviors,

mannerisms, and vocalizations disrupt other classes in the building. Tr. 329:13-24.

45. Student does not model appropriate behaviors of other students in his class because their behaviors and activities are far above his functioning level. He is not capable of duplicating their behavior. Student is not cognitively capable of doing the academics of the others in his class. Tr. 149:25 – 150:13, 151:23-25. Other students in Student's class have modeled some of his inappropriate behaviors, such as head banging. Tr. 231:21 – 232:3. Student does not have any meaningful interaction with the other students in his class or with other students throughout his day at school. Tr. 150:17-151:22, 207:16-18, 292:12 –293:18. Oak Grove cannot give Student the opportunity to interact with peers at his level of functioning. Tr. 151:2-11 – 152:3. The others in Student's class have meaningful interaction with each other through conversation, group projects and sharing in the learning experience. Tr. 153:21-25.

46. Oak Grove has a behavior plan in place that was working effectively as of November 2003. Tr. 109:9-12, 109:24 – 110:7. Student's teacher consistently implemented his sensory diet and behavior plan in the classroom. Tr. 322:18-25, 333:4-6. Student's problem behaviors seem to diminish or extinguish when he engages in an activity that is meaningful to him. Tr. 325:109.

47. Student's teacher at Maple Elementary struggles to continue to develop activities at Student's functioning level. Tr. 136:8-13. She provides academic instruction to the other students in her class; she can not spend as much one-on-one instructional time with Student as he needs. Tr. 312:21 – 313:6.

48. Progress for Student does not mean that he has mastered a goal; it simply means that he is getting better at a given task. Tr. 181:1-6. Although Student's progress reports may

reflect progress, progress is relative because it takes Student so long to learn a skill that the progress is *de minimis*. Student has not mastered any skills or applied them in a generalized situation. Tr. 160:6-12, 165:5-7. Student's progress comes in such small increments that the School District has narrowed his objectives/benchmarks to minute steps so that he shows progress. For example, Student has been working on a sorting goal for several years. He started sorting one item to a picture; he is now at the 60 percent consistency level, which is not considered mastery of a goal. Tr. 221:15 – 222:8. Review of the data collected on Student's progress reports reveals that his progress is the most minimal progress possible. Ex. 106.

49. Student's goals have changed very little during his years of attendance at Oak Grove. Tr. 159:23 – 160:1. He has worked on the same goals for multiple years. Tr. 179:7-13, 181:8-9; 219:19 - 224:4; Exs. 25 and 53. Oak Grove has made very little progress in teaching Student expressive language skills. Tr. 201:11-13. Presently, Student is not making any progress on his functional skills goals. Tr. 297:14 – 299:15, 300:1-4, 301:21-23.

50. Parents suggest that Student made progress on a goal that was discontinued by the School District due to the addition of the augmentative communication device. Any further progress reporting on that goal would be an error. Tr. 304:23 – 305:12.

51. Student uses his augmentative communication device at school only when prompted by a teacher and with hand over hand assistance to push the icon. He does not independently interact with his device at all. Tr. 283:17-24. Even when attempting to get Student to use the device for play, he flips the device over, refusing to use it. Tr. 289:19 -290:23. Student continually pushes the same buttons on his augmentative communication device and is not using it to communicate. Tr. 313:11-314:12.

52. Student's cooperation decreased from November 2003 when depositions were taken to the date of the Hearing. Tr. 160: 18 – 20. During the last few months, Student has not engaged in on-task behaviors as much as before. Student currently is not on task at all during the day. Tr. 351:14-353:3.

53. During 2003-2004, his first year at Maple Elementary, Student became increasingly frustrated with his school environment. He throws items that he used to enjoy, he refuses to do anything, he lays on the floor for extended periods of time rolling around, he hits and pinches when adults try to interact or re-engage him, he cries more frequently, and he is less involved in classroom activities. Tr. 307:17 – 308:14. Student's behavior charts reflect increased frustration (he receives fewer and fewer smiley faces throughout his day) and his inappropriate behaviors, such as hitting, pinching, and refusing to work have increased. Tr. 311:4-20. He becomes physically aggressive if asked to do anything except lay on the floor and roll around. Tr. 346:17 -347:5. Ms. Atkinson expressed her belief that Student lacks motivation because the environment is not appropriate for him to learn, and his program is not functional or meaningful to him. Tr. 323:25- 326-24, 302:10 – 303:5. Student's academic functioning level frustrates him, and Ms Atkinson testified that a behavior intervention plan will not alleviate his academic frustration. Tr. 339:18-340:18.

54. Ms. Bird testified that Student used to be happy and excited about being at school. Since moving to the academically-oriented classroom at Maple Elementary, he does not dance, vocalize or show happiness or become excited anymore. Tr. 196:3-198:19. He stopped progressing, even minimally, in the classroom and has "slid down the hill." He regressed over the past few months due to the increasing difficulty of the class. Tr. 308:15-16, 323:9–15.

55. Testimony revealed that Student's present level of educational performance reported in his last IEP was no longer accurate at the time of the Hearing because of his recent regression. Tr. 343:17 – 344:13, 346:11-23. His PLEP changed very little from February 2002 through June 2003, and most of the changes do not reflect progress. Ex. 82. Student is likely to become increasingly isolated as he ages because the developmental gap between Student and his non-disabled peers will continue to grow. Tr. 199:20 – 200:22. Oak Grove is not providing Student with the educational benefit that he needs. Oak Grove has made a good faith effort to provide a free appropriate public education to Student, but Oak Grove is unable to implement an appropriate IEP for Student going forward. Tr. 329:25-330:19, 255:20-256:11.

56. There was conflicting testimony about Student's bus ride from home to Maple Elementary taking between 15 minutes and 35 minutes. Tr.38:2-22; Tr. 211:14-18. When Student arrives at school in the morning, he repeatedly bangs his head and vocalizes and requires hand over hand assistance to take off his coat and hang up his backpack. Tr. 308:25 – 309:13.

57. There was conflicting testimony about Parents request for a functional behavior assessment. Parents testified at the Hearing that they believed that a functional behavioral assessment is testing Student on what he can and cannot do and where his mentality is. Parents testified that Marilyn Stubbs attended a May 28, 2003 consent meeting and requested a functional behavior assessment. Tr. 118:15 – 119:2, 120:3-11;Tr. 215:19 – 216:15; Ex. 70.

58. Oak Grove did not conduct a separate functional behavioral assessment as part of Student's evaluations because the School District did not believe it was needed based on the daily behavior data that the School District maintained for Student. Tr. 170:6-9. Oak Grove did not receive a request from Parents to conduct a formal functional behavioral assessment until

August 2003. Tr. 170:4-5, 215: 2 – 9. Oak Grove has collected daily behavior data on Student for 5 years. Tr. 169:12-18. Ms. Atkinson keeps behavioral data on Student throughout his day. Tr. 304:2-4.

59. Oak Grove does not serve any other severely handicapped students in the School District. Oak Grove does not operate, and is unable to provide, a program of special instruction for severely handicapped children. Oak Grove is not approved by DESE to operate a program of special instruction for severely handicapped children. Tr. 184:4–186:25. Oak Grove does not have any program of special instruction for a student as severely handicapped as Student. Oak Grove has developed Student’s programming specifically for him. Tr. 136:14-17. Oak Grove does not write staffing assignments into their IEPs. Tr. 217:22-24. Oak Grove is not located within the boundaries of a special school district. Tr. 184:7-10.

60. Changing Student’s placement and program is expected to have a greater impact on his motivation, his willingness to work, and his success than a different behavior intervention plan. Tr. 340:19 – 341:11. Student’s inappropriate behaviors are expected to decrease or extinguish if he were in an appropriate educational setting. Tr. 356:12 – 357:10.

Conclusions of Law

1. This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq.; the IDEA’s implementing regulations, 34 C.F.R. Part 300; Missouri’s special

education statutes, §§162.670-162.999, RSMo.; and the Missouri state regulations implementing it's special education statutes, 5 C.S.R. §70-742.140 ("Individuals With Disabilities Education Act, Part B. This regulation incorporates by reference changes to the annual program plan required by new federal statutes for the provision of the services to eligible children.") The Missouri regulation is referred to as the State Plan for Part B of the Individuals With Disabilities Education Act (2002), ("State Plan"). The IDEA, its regulations and the State Plan set forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the School District in providing special education and related services to students with disabilities.

2. The Student is a "child with a disability," as that term is defined in the IDEA, its regulations, 34 C.F.R. §300.7 and the State Plan. He is a severely handicapped child for purposes of Missouri Law §162.675 RSMo. Educationally Student is diagnosed as autistic and mentally retarded.

3. The School District is a Missouri School District organized pursuant to Missouri Statutes §162.011 et seq. RSMo. Parents and Student are now and have been residents of the School District at all times relevant to this due process proceeding, as defined by §162.020 RSMo. and the State Plan.

4. Pursuant to Missouri law, the Oak Grove R-VI School District generally is responsible for providing special education and related services to students with disabilities, as defined by the Missouri State Plan for Implementing Part B of the Individuals with Disabilities Education Act, who reside in the school district including Student.

5. The State Plan was in effect at all material times during this proceeding. The State Plan constitutes regulations of the State of Missouri, which further define the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies.

6. The purpose of the IDEA and its regulations is: (1) “to ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs”; (2) “to ensure that the rights of children with disabilities and their parents are protected”; and (3) “to assess and ensure the effectiveness of efforts to educate those children.” 34 C.F.R. § 300.1.

7. The IDEA and Missouri law require that a disabled child be provided with access to a “free appropriate public education.” (“FAPE”) Board of Education of the Hendrick Hudson Central School District of Westchester County v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982), and §162.670 RSMo. The term “free appropriate public education” is found in the IDEA 20 U.S.C. §1401(8) and is defined by 34 C.F.R. § 300.8 as follows:

“...the term ‘free appropriate public education’ means special education and related services that--(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include preschool, elementary school, or secondary school education in the State involved; and, (d) Are provided in conformity with an IEP that meets the requirements of §300.340--300.350.” A principal component of the definition of FAPE is that the special education and related services provided to the student with a disability, “meet the standards of the SEA” (State Board of Education), and “the requirements of this part”. 34 C.F.R. Part 300.

8. If parents believe that the educational program provided for their child fails to meet this standard, they may obtain a state administrative due process hearing. 34 C.F.R. §300.506; Thompson v. Board of the Special School District No. 1, 144 F.3d 574, 578 (8th Cir.

1998); Fort Zumwalt School District v. Clynes, 119 F.3d 607, 610 (8th Cir. 1997), cert. denied 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed2d 1090 (1998).

9. The IDEA is designed to enable children with disabilities to have access to a free appropriate public education which is designed to meet their particular needs. O'Toole by O'Toole v. Olathe District Schools Unified School District No. 233, 144 F.3d 692, 698(10th Cir.1998).

10. Petitioners challenge Student's current (2003) IEP and educational placement of public separate day facility. The key inquiry is whether the School District's placement is appropriate for Student "[A]lthough the IDEA mandates individualized 'appropriate' education for disabled children, it does not require school district to provide a child with the specific educational placement that her parents prefer." Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 58 (8th Cir. 1999). "The issue is whether [the school district's] placement [i]s appropriate, not whether another placement would also be appropriate, or even better for that matter." Heather S. v. State of Wisconsin, 125 F.3d 1045, 1057 (7th Cir. 1997).

11. The Hearing Panel is obliged to give deference to decisions made by the School District's professional educators. "[W]hen reviewing an IEP [courts and hearing panels] must keep in mind that the state and local educational agencies are deemed to possess expertise in education policy and practice." Burilovich v. Board of Ed. of the Lincoln Consol. Schools, 208 F.3d 560, 567 (6th Cir. 1999); *see also* Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d at 610 (stating that courts should reject a reviewing officer's analysis if it does not appear to give sufficient weight to the views of the professional educators).

12. It is undisputed that Student is severely handicapped. In June 2003, the Oak Grove R-VI School District submitted its Justification for Separate School Placement to DESE, along with his current IEP and evaluation report. On July 30, 2003, DESE notified Oak Grove that Student is eligible for services provided by the state board of education for severely handicapped children. On August 25, 2003, Oak Grove referred Student to DESE for placement as a severely handicapped child, notifying DESE that Oak Grove was unable to adequately educate him.

13. Student's identification as a severely handicapped child is dispositive in this case. Once a child is determined to be severely handicapped, "Mo. Rev. Stat. §162.725 provides that DESE becomes the direct provider of educational services to [the student]." Mo. Dept. of Elementary and Secondary Education, et al. v. Springfield R-12 Sch. Dist., et al., 358 F.3d 992, 999 (C.A.8 (Mo.) 2004).

14. After a School District notifies DESE that it cannot adequately educate a severely handicapped child, "the IDEA and Missouri state law place[d] the onus upon DESE and its divisions to provide [the student] with a free appropriate public education...." Springfield, 358 F.3d 992 (C.A.8 (Mo.) 2004). DESE became responsible for Student's education when the School District sent in its referral on August 25, 2003.

15. Missouri law further prescribes that Student be placed with DESE because Oak Grove does not operate an approved program of special instruction for severely handicapped children. Missouri statute provides, in pertinent part:

The state board of education shall provide special educational services for all severely handicapped children residing in school districts which are not included in special districts provided that such districts are unable to provide appropriate programs of special instruction for severely handicapped children;

however, this shall not prevent any school district from conducting a program for the special instruction of severely handicapped children, except that such program must provide substantially the same special educational services as would be provided in a school operated by the state board of education *and* such program must be approved by the state department of elementary and secondary education in accordance with regulations established pursuant to §162.685.

§162.725(1) R.S.Mo. This statute does not prevent Oak Grove from conducting a program of special instruction for severely handicapped children, except that “such program must provide substantially the same special education services as would be provided in a school operated by the state board of education and such program must be approved by the state department of elementary and secondary education....” *Id.*

16. Determination of whether a severely handicapped child can be served in a local school district in an approved program of special instruction for severely handicapped children is made by DESE through the eligibility process established by the state regulations implementing Part B of IDEA. *See* Regulation XI, Missouri State Plan for Special Education. The regulations require DESE to consider whether the local school district operates an approved program of instruction in making its eligibility determination. *See* State Plan at 124. DESE considers all services provided by the local school district in making its determination. *See* State Plan at 126.

17. Implicit in the Missouri statutory scheme is that DESE will not determine that a severely handicapped student is eligible for placement with DESE if the student can be served in the local school district. Section 162.735 RSMo. provides that DESE may assign severely handicapped children to state schools for the severely handicapped, except severely handicapped children residing in special school districts and in districts providing approved special education services for severely handicapped children.

18. A program of special instruction offered by a local school district for severely handicapped children must be approved by DESE, and it must “provide substantially the same special educational services as would be provided in a school operated by the state board of education.” §162.725(1) R.S.Mo. The special education programs established by the state board of education for severely handicapped children must be “designed to develop the individual pupil in order that he may achieve the best possible adjustment in society under the limitation of his handicap.” §162.725(2) R.S.Mo.

19. Oak Grove does not have a program of special instruction for severely handicapped students in its district. The special education services provided by Oak Grove to Student are not sufficient to enable him to achieve any reasonable adjustment to society as contemplated by Missouri statute. Oak Grove has not been approved by DESE to operate a severely handicapped program such as is required by statute. DESE determined that Student is eligible for services provided by the state board of education.

20. Oak Grove is a small school district with an enrollment of approximately 2000 students. Student is the only student identified as severely handicapped that the School District serves. It is not able to provide a program of special instruction for severely handicapped students such as Student because it does not have appropriate spaces or equipment for therapies, nor does it have a functional living area, a simulated workshop or sensory activities. The nurse’s office is small and offers no privacy or showering/cleaning facilities for changing students who are not toilet trained. The school staff is committed and professional, but they do not have training and experience necessary to serve severely handicapped students. Therapists are not available throughout the day to address Student’s ongoing needs. There is no functional program

or curriculum appropriate for severely handicapped students sufficient to enable them to learn the life skills needed to become as independent as possible in life.

21. Parents contend that Oak Grove can provide a program of special instruction their severely handicapped child because the staff both certificated and non-certificated, assigned to Student are experienced, professional and committed to educating handicapped students. This is not enough to overcome the daunting challenges presented by his disabilities.

22. Parents argue that IDEA's core policy is mainstreaming, citing 20 U.S.C. §1400(c)(1): "Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society" and that 20 U.S.C. §1400(a)(5)(A) emphasizes assuring access to disabled children "in the general curriculum to the maximum extent possible" and 20 U.S.C. §1400(a)(5)(C) establishes that special education should be "a service for [disabled] children rather than a place where they are sent" and finally that 20 U.S.C. §1412(a)(5) entitles disabled children to the "least restrictive environment" meaning that children "To the maximum extent appropriate," should stay close to their non-disabled peers.

23. Parents suggest that case law places a premium on mainstreaming citing: "Congressional policies indicate a preference for educating disabled children in a mainstreamed classroom whenever possible." Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027, 1034; 20 U.S.C. § 1400(c) (5) (D); Missouri Dept. of Elementary and Secondary Educ. v. Springfield R-12 School Dist., 358 F.3d 992 (C.A.8 (Mo.) 2004) and other cases.

24. Parents contend that the School District although able to do so, failed to provide with several things, including: (a) Functional Behavior Assessment with the input of an autism expert; (b) Adequate Behavior Intervention Plan (BIP) requiring more than a "Safe Spot" that is

designed to address his unique behavior problems and his autism, in particular; (c) Counter Control; (d) Reinforcement Schedule; (e) Applied Behavior Analysis; and (f) the Missouri Severe Disability Fund has not been accessed for Student. While some of these actions may be helpful to Student, they do not change the fact that Student is severely disabled and that there is no program offered by the School District for severely disabled students as required by state law.

25. It is undisputed that Student is a severely handicapped child. The testimony was clear that Student has been “stagnating” to use Parents’ language for an extended period of time and he is not benefiting by the education being provided by School District. This is not for want of dedication, commitment or effort, but it is because Student is very difficult to educate and by statutory definition he is unable to benefit from or meaningfully participate in programs in the public schools for handicapped children. §162.675 R.S.Mo.

26. During the August 2003 IEP meeting Parents were accompanied by their advocates/ attorneys, nonetheless the IEP team *unanimously* decided on “Reasons for Rejection of Less Restrictive Options” agreeing that Student is unable to meaningfully benefit from a less restrictive placement than a public separate day facility. Parents were provided an adequate opportunity to participate in the development of Student’s IEP and to engage in the process of discussing and deciding his placement.

27. Student needs an environment that is designed for severely handicapped students including access to a functional program and curriculum focused on self help skills, life skills and community-based instruction. He requires a therapy-intensive setting with sensory activities readily available to him. It is hoped that he will benefit from learning skills in an apartment-like setting and in a simulated sheltered workshop because he needs an environment where he can

learn to be independent in as close to a realistic setting as possible to help him to generalize the skills he learns.

28. Student has not benefited from exposure to an academic curriculum and he is not capable of being educated in a regular education setting with any amount of accommodations, modifications and supports. Student has not benefited from being in classes with less disabled and nondisabled peers because he has no meaningful interaction with them. Student's presence in his class at Maple Elementary has caused substantial disruption to the instruction of the other students in the class. He is not able to be in close proximity to other children without engaging in inappropriate behaviors such as pinching, hitting or throwing.

29. The IDEA requires that each disabled child be educated in the "least restrictive environment" ("LRE"):

To the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5). The IDEA's preference to educate handicapped children in classes with non-handicapped children "is normally articulated as 'mainstreaming' or educating the child in the least restrictive environment.'" Reese v. Board of Educ. of Bismarck R-V Sch. Dist., 225 F. Supp. 2d 1149, 1159 (E.D. Mo. 2002). "Despite the statutory preference for mainstream placements, the IDEA recognizes that some disabled students need full-time care in order to receive educational benefits." Independent Sch. Dist. v. A.C., 258 F.3d 769, 774 (8th Cir. 2001). "The Act thus provides for the education of some handicapped children in separate classes or institutional settings." Rowley, 458 U.S. at 181, fn. 4. The IDEA defines "special education" to

include “instruction conducted in the...home, in hospitals and institutions, and in other settings.” 20 U.S.C. §1401(25); *see also* 34 C.F.R. §300.26.

31. To implement the concept of LRE, each state is required to have on file procedures which ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” 34 C.F.R. §300.130. Specifically, 34 C.F.R. §300.551 provides that the continuum of alternative placements must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.

32. To comply with 34 C.F.R. §300.551, the Missouri State Plan for Special Education specifically prescribes a continuum of special education placements, which includes public separate day facilities. Section 162.735 R.S.Mo. underscores the appropriateness of placing a disabled child in a public separate day facility when it provides:

The state department of elementary and secondary education may assign severely handicapped children...to state schools for severely handicapped children.... Furthermore, the state board of education may contract for the education of a severely handicapped child with another public agency or with a private agency when the state department of elementary and secondary education determines that such an arrangement would be in the best interests of the severely handicapped child.

33. Courts recognize that separate schools are a permissible method of utilizing scarce resources and centralizing services to provide services to the severely disabled student population. *See St. Louis Developmental Disabilities Treatment Center Parents Ass’n v. Mallory*, 591 F. Supp. 1416 (W.D. Mo. 1984) (holding that Missouri’s system of providing separate schools for the severely disabled does not violate the IDEA or the Constitution). The Eighth Circuit has held that the IDEA does not require that students with severe disabilities be educated within a local school district when the student would receive very little benefit from

interaction with peers who are not disabled. A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158 (8th Cir. 1987), *cert denied* 484 U.S. 847 (1987) (affirming a local education agency's placement of a severely mentally retarded student to a state school designed for severely handicapped children.).

34. Student's IEPs have been appropriate and the Oak Grove staff has made a good faith effort to provide Student with a free appropriate public education, however, review of his progress records shows that Student's progress in Oak Grove is limited to small increments in certain areas. In other areas, he has exhibited no progress. Student appears to be regressing in his current setting, due to his increased level of frustration any progress that Student has exhibited from year to year is *de minimus* and insufficient to warrant maintaining a placement in the School District. The record shows that Student is unable to benefit from or meaningfully participate in special education programs at Oak Grove.

Decision and Order

The Hearing Panel finds and concludes that:

10. Student is a severely handicapped child and, as such, his placement is with DESE.
11. Oak Grove does not operate an approved program of special instruction for severely handicapped children.
12. Oak Grove does not operate a program of special instruction for severely handicapped children sufficient to enable such a child to achieve the best possible

adjustment in society under the limitations of his handicap.

13. Oak Grove is unable to provide a program of special instruction for this severely handicapped child, which would provide FAPE.
14. Student is unable to benefit from or meaningfully participate in a program for handicapped children at Oak Grove.
15. A public separate day facility is an appropriate placement for Student.
16. Student has been accepted by DESE as a severely disabled child and qualified him for the severe disability fund, thus by statute Oak Grove not longer must fulfill any responsibility to Student and DESE is responsible for his education and must hold an IEP meeting within the next 30 days.
17. Parents' request for due process is dismissed.
18. School District's request for due process is dismissed

Appeal Procedure

PLEASE TAKE NOTICE that these foregoing Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision pursuant to the Missouri Administrative Procedures Act, §536.0 10 et seq. RSMo.

PLEASE TAKE NOTICE that you have a right to file a civil action in Federal or State Court pursuant to the IDEA. See 34 C.F.R. §300.512.

Dated: April ___, 2004

Margaret M. Mooney, Hearing Chair

Terry Allee, Panel Member

Rand Hodgson, Panel Member

Copies of this Decision will be mailed to Counsel for Parents and the Oak Grove School District on this date by certified mail return receipt requested and sent by facsimile to same.